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Abdul Salin bin Amming & Ors v Bumi Aseri Sdn Bhd & Ors

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HIGH COURT (TAWAU) — ORIGINATING SUMMONS NO TWU-24–27/4 OF 2018
ALWI ABDUL WAHAB J
28 NOVEMBER 2018

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Land Law — Appeal — Claim for state land under native customary right — Director of Land and Survey dismissed claim — Appellant appeal against dismissal of claim for land — Whether land claimed by appellant under forest reserve — Whether decision by the Director of Land and Survey not appealable — Whether appellant's claim should not be allowed as the location and the boundary of land claimed were not ascertained — Whether NCR claim exclusively for the Assistance Collector of Land Revenue or the collector to determine — Land Ordinance (Sabah Cap 68) s 41(1)

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This was an appeal by the appellant by way of originating summons against the decision of the Director of the Lands and Survey ('the second respondent') pursuant to s 41(1) of the Land Ordinance (Sabah Cap 68) ('the Ordinance'). Before the second respondent, the appellant's appeal against the Assistance Collector of Land Revenue's decision was dismissed on the grounds that lots 3, 4, 2 and 6 ('the lots') were forest reserves. The lots were situated at Tingkayu in the district of Kunak which were allegedly entered and occupied by the appellants before 1998 for oil palm plantation and goat and cattle rearing farms. It was further alleged by the appellants that they started to harvest the oil palm fruits produced from the lots in 2005. As of 2007, the appellants alleged that they had planted a total of 19, 250 oil palm trees within the lots measuring of about 350 to 380 acres. reasons of the said cultivation and livestock farms carried out by the appellants in the By lots, the appellants submitted that as natives of Sabah, they had satisfied both the minimum requirement of 50 fruit trees per hectare and the requirements under s 15(a)–(g) of the Land Ordinance for native customary rights ('NCR') in the lots. The appellants averred that together with other occupiers of the other ten lots, they applied to the Assistance Collector of Land Revenue ('ACLR') for the issuance of a document of title for all the 14 lots cultivated by them since 2002 in the land application. The application for the issuance of document of title was rejected on the ground that the lots were proposed as government reserves. The Secretary of Natural Resources of the Chief Minister's Department then directed in writing for the decision in rejecting the appellants' land application to be reconsidered. On 23 March 2011, the Land Utilization Committee of the Kunak District indorsed the appellants' land applications and recommended for approval to the director. The Secretary of Natural Resources approved the appellants' land applications for the said lots and directed the director to carry

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out the survey of the 14 lots of the said lands in native title. While the appellants' land applications and land enquiry were still pending for consideration, the director on 18 September 2008 issued an offer to alienate land to the first respondent for 200 hectares of land pursuant to the first respondent's land application. The survey was objected by the appellants as the same overlapped with the lots occupied and cultivated by the appellants. It was the appellants' submission that the director was wrong to issue the order to alienate land to the first respondent since the director knew and ought to know of the appellants' rights and interests in respect of the same land. According to the appellants, the term 'state land' meant the land which had not been reserved for public purpose after the year 1930 until the time such land was claimed. The appellants submitted that the word 'hereafter' meant the interim period after the year 1930 until the time the subject land was claimed and in the present appeal was at the time the claim made by the appellants. The issues to be determined were: (a) whether the second respondent's interpretation of state land under s 4 of the Land ordinance; (b) whether the second respondent's finding that the lots were within the area under the proposed Forest Reserve land were wrong in law and fact; (c) whether the decision of the second respondent was appealable; and (d) whether the appellants had established their native customary rights claim.

Held, allowing appeal in terms with costs of RM2,000 subject to the payment of allocatur:

(1) There was nothing to show that the lands in lots 3, 4, 2 and 6 applied by the appellants had been reserved for any public purpose and for forest reserve after 1930 until the time when their applications were being considered in 2002. The decision of the second respondent could not be supported and was utterly wrong because there was no proof to show that the appellants' lots were within the area for Forest Reserve. The court was of the view that the lots were still State land until they were declared to be so as Forest Reserve by way of a gazette notification pursuant to s 12(1) of the Forest Enactment 1968. At best, the said lands were merely proposed for Forest Reserve during the LUC meeting held as mentioned in the ACLR's letter. The director had erred in his decision when he said the appellants had proved NCR in the lots according to s 15(c) of the Ordinance but at the same time ruled that the lots were located within the forest reserve area with no supporting evidence. It was an erroneous finding that the lands were no longer state land. Therefore, the decision of the second respondent was liable to be set aside (see paras 49 & 53–55).

(2) The present appeal was not to challenge the director's discretion to alienate state land made under s 9 of the Ordinance. The appeal was in respect of the decision of the second respondent in dismissing the

appellant's appeal on the ground that the appellants' lots were situated within the area proposed for forest reserve (see para 60).

(3) The court was of the view that the issue of NCR claim was exclusively for the ACLR or the collector to determine under the Ordinance and the High Court being the appellate court would only have the jurisdiction to revise such an issue whenever there was an appeal. As there was no appeal on the issue of NCR which had been determined by the ACLR and the Director, it was not therefore within this court jurisdiction to interfere or intervene with such findings and determination (see paras 66 & 68).

(4) It was viewed that the issue of the uncertainty of the location and the boundary of the appellants' native customary rights should be determined by the relevant authority in the light of the latest findings of the Assistance Collector of Land Revenue and the second respondent both in 2017 and 2018 (see para 70).

[Bahasa Malaysia summary

Ini adalah rayuan oleh pihak perayu melalui saman pemula terhadap keputusan Pengarah Tanah dan Ukur ('responden kedua') menurut s 41(1) Ordinan Tanah (Sabah Bab 68) ('Ordinan tersebut'). Dihadapan responden kedua, rayuan perayu terhadap Pemungut Hasil Tanah telah ditolak atas alasan bahawa lot-lot 3, 4, 2 dan 6 ('lot-lot tersebut') adalah rizab hutan. Lot tersebut terletak di Tingkayu di daerah Kunak yang didakwa telah dimasukki dan diduduki oleh perayu sebelum tahun 1998 untuk perladangan kelapa sawit dan ladang kambing dan penternakan lembu. Ianya seterusnya dicadangkan oleh perayu bahawa mereka mula menuai buah kelapa sawit yang dihasilkan dari lot pada tahun 2005. Bagi tahun 2007, perayu mendakwa bahawa mereka telah menanam sebanyak 19,250 pokok kelapa sawit di dalam lot yang berukuran sekitar 350 kepada 380 ekar. Alasan-alasan penanaman dan penternakan yang dijalankan oleh perayu adalah berdasarkan kepada lot. Perayu menghujahkan bahawa sebagai penduduk asli Sabah, mereka telah memenuhi keperluan minimum 50 pokok buah setiap hektar dan keperluan di bawah s 15(a)–(g) Ordinan Tanah untuk hak adat bumiputera ('NCR') dalam lot-lot tersebut. Perayu menyatakan bahawa bersama-sama dengan penduduk sepuluh lot yang lain, mereka telah memohon kepada Pemungut Hasil Tanah ('ACLR') untuk pengeluaran dokumen hakmilik bagi kesemua 14 lot yang ditanam oleh mereka sejak tahun 2002 dalam permohonan tanah. Permohonan untuk pengeluaran dokumen hakmilik ditolak atas alasan bahawa lot tersebut telah dicadangkan sebagai rizab kerajaan. Setiausaha Sumber Asli Jabatan Ketua Menteri kemudiannya mengarahkan secara bertulis untuk keputusan menolak permohonan oleh perayu tersebut untuk dipertimbangkan semula. Pada 23 Mac 2011, Jawatankuasa Pemantauan Tanah daerah Kunak mengesahkan permohonan tanah perayu dan mengesyorkan untuk untuk persetujuan oleh pengarah. Setiausaha Sumber Asli telah meluluskan permohonan tanah perayu untuk lot tersebut dan

mengarahkan pengarah untuk menjalankan ukur 14 lot tanah tersebut dalam hakmilik bumiputera. Semasa permohonan dan siasatan tanah perayu masih dalam dipertimbangan, pengarah pada 18 September 2008 telah mengemukakan tawaran untuk pemberimilikan tanah kepada responden pertama untuk 200 hektar tanah berdasarkan permohonan tanah responden pertama. Ukuran telah dibantah oleh perayu kerana tanah yang sama bertindih dengan tanah yang diduduki dan digemburkan oleh perayu. Ianya adalah hujahan perayu bahawa pengarah salah untuk mengeluarkan perintah untuk memberimilikan tanah kepada responden pertama oleh kerana pengarah mengetahui dan patut mengetahui hak dan kepentingan perayu terhadap tanah yang sama. Menurut pihak perayu, istilah 'tanah negeri' bermaksud tanah yang tidak dirizabkan untuk maksud umum selepas tahun 1930 sehinggalah tanah tersebut dituntut. Pihak perayu mennghujahkan bahawa perkataan 'hereafter' bermaksud tempoh interim selepas tahun 1930 sehinggalah masa tanah tersebut dituntut dan dalam rayuan semasa adalah pada masa tuntutan yang dibuat oleh perayu. Isu-isu yang perlu ditentukan adalah: (a) sama ada penafsiran responden kedua mengenai tanah negeri di bawah s 4 Ordinan Tanah; (b) sama ada dapatan kedua responden bahawa lot-lot tersebut berada dalam kawasan di bawah cadangan Tanah Rizab Hutan adalah salah dari segi undang-undang dan fakta; (c) sama ada keputusan responden kedua boleh dirayu; dan (d) sama ada pihak perayu telah membuktikan tuntutan hak asasi peribumi mereka.

Diputuskan, membenarkan rayuan seperti permohonan dengan kos RM2,000 tertakluk kepada pembayaran alokatur:

(1) Tiada apa-apa untuk menunjukkan bahawa tanah-tanah di lot-lot 3, 4, 2 dan 6 yang dipohon oleh perayu telah direzabkan untuk apa-apa kepentingan awam dan rizab hutan selepas 1930 sehinggalah pada masa permohonan mereka dipertimbangkan pada tahun 2002. Keputusan responden kedua tidak dapat disokong dan begitu jelas terkhilaf kerana tidak ada bukti untuk menunjukkan bahawa lot-lot pihak perayu berada di kawasan Kawasan Rizab Hutan. Mahkamah berpendapat bahawa lot tersebut adalah masih tanah Negeri sehingga ianya diisytiharkan sebagai Rizab Hutan melalui pemberitahuan gazet menurut s 12(1) Enakmen Hutan 1968. Yang tepat, tanah tersebut hanyalah diusulkan untuk Rizab Hutan semasa mesyuarat LUC yang diadakan seperti surat ACLR. Pengarah tersebut telah terkhilaf dalam keputusannya apabila beliau menyatakan pihak perayu telah membuktikan NCR berdasarkan lot seperti s 15(c) Ordinan tersebut tetapi dalam masa yang sama memutuskan bahawa lot tersebut terletak dalam kawasan rizab hutan tanpa bukti sokongan. Ianya adalah satu kekhilafan dapatan bahawa tanah tersebut tidak lagi tanah negeri. Oleh itu, keputusan responden kedua boleh diketepikan (lihat perenggan 49 & 53–55).

(2) Rayuan semasa bukan untuk mencabar budi bicara pengarah untuk

memberikan hak tanah negeri yang dibuat di bawah s 9 Ordinan tersebut. Rayuan semasa adalah berkenaan dengan keputusan responden kedua dalam menolak rayuan pihak perayu atas alasan bahawa lot pihak perayu terletak dalam kawasan yang dicadangkan untuk rizab hutan (lihat perenggan 60).

(3) Mahkamah berpendapat bahawa isu tuntutan NCR adalah secara esklusif untuk ACLR atau pemungut untuk menentukan di bawah Ordinan tersebut dan Mahkamah Tinggi sebagai mahkamah rayuan hanya akan mempunyai bidang kuasa untuk menyemak semula isu tersebut apabila terdapat rayuan. Memandangkan tiada rayuan mengenai isu NCR yang telah ditentukan oleh ACLR dan Pengarah, maka ianya tidak tertakluk dalam bidang kuasa Mahkamah ini untuk mengganggu atau campur tangan terhadap dapatan dan keputusan tersebut (lihat perenggan 66 & 68).

(4) Ianya adalah ditentukan bahawa isu ketidakpastian lokasi dan sempadan hak-hak adat peribumi pihak perayu harus ditentukan oleh pihak berkuasa yang relevan berdasarkan penemuan terbaru Pemungut Hasil Tanah dan responden kedua masing-masing pada tahun 2017 dan 2018 (lihat perenggan 70).]

Cases referred to

Ara bte Aman & Ors v Superintendent of Lands and Mines, Second Division [1975] 1 MLJ 208 (refd)
Darinsok Pangiran Apan & Ors v Hap Seng Consolidated Bhd & Ors [2011] 6 CLJ 733, CA (refd)
Magudar bin Ambit v Rambilin bt Ambit & Ors [2014] 5 MLJ 873, CA (refd)
Norsitah binti Ottoh v Nasry bin Yahya & Ors [2010] MLJU 2207, HC (refd)
Rustimah bt Buyong & Anor v Lembaga Industri Getah [2013] 10 MLJ 535, HC (refd)

Legislation referred to

Interpretation (Definition of Native) Ordinance s 3(1)
Sabah Land Ordinance ss 4, 9, 15(a), (b), (c), (d), (e), (g), 41(1)

Kong Hong Ming (Lee & Kong) for the appellants.
Kelly Teo (Liew Hon Min) for the first respondent.
State Attorney General's Chambers, Sabah for the second and third defendants.

Alwi Abdul Wahab J:

INTRODUCTION

[1] This is an appeal by the plaintiffs/appellants by way of originating summons ('encl 1') against the decision of the Director of the Lands and Survey

('Director') pursuant to s 41(1) of the Land Ordinance (Sabah Cap 68) given on 16 March 2018 in Director Land Enquiry (Appeal) Nos 37, 39, 48 and 39 of 2017.

[2] On 28 November 2018, I allowed the originating summons in terms with cost of RM2,000 to the appellants subject to the payment of allocatur.

[3] By the notice of appeal dated 19 December 2018, the first respondent appealed to the Court of Appeal against this court's decision.

[4] I now give my grounds of decision.

THE BACKGROUND FACTS

[5] Before the director, the appellants' appeal against the assistance collector of land revenue's ('ACLR') decision was dismissed on the ground that lots 3, 4, 2 and 6 ('the lots') are forest reserves.

[6] The lots are situated at Tingkayu in the District of Kunak which were allegedly entered and occupied by the appellants before 1998 for oil palm plantation and goat and cattle rearing farms. The lots are part of the 14 lots belonging to the other occupiers within the same area of Tingkayu, Kunak.

[7] Specifically, the lots that were occupied by the respective appellants are shown in the table below:

Lot Nos	Appellant(s)
Lot 3	Abdul Salin bin Amming
Lot 4	Ajirul bin Khatib Aming
Lot 2	Mohammad Nashah bin Abdul Salin
Lot 6	Inda Lima bt Hatib Aming

[8] It was further alleged by the appellants that they started to harvest the oil palm fruits produced from the said lots in 2005.

[9] As of 2007, the appellants alleged that they had planted a total of 19,250 oil palm trees within the said lots measuring of about 350 to 380 acres. The average number of oil palm trees over the said lots is 55 fruit trees per acre which has exceeded 50 fruit trees of economic value per each hectare of land.

[10] By reason of the said cultivation and livestock farms carried out by the appellants in the said lots, the appellants submitted that as natives of Sabah, they had satisfied both the minimum requirement of 50 fruit trees per hectare and the requirements under s 15(a), (b), (c), (d), (e) and (g) of the Land

A Ordinance for native customary rights ('NCR') in the said lots.

[11] The appellants averred that together with the other occupiers of the other ten lots, they have applied to the ACLR for the issuance of a document of title for all the 14 lots cultivated by them since 2002 in the land applications B Nos PT 20–03240179 to 20–03240191 and 20–03240193.

[12] On 31 October 2002 and further on the 25 January 2008, the ACLR rejected the appellants' application for the issuance of a document of title for the lots on the ground that the said lots were proposed as government reserves C or 'simpanan kerajaan'.

[13] The appellants further averred that as a result of the ACLR's rejections of the appellants' land applications since 2002, the Secretary of Natural D Resources of the Chief Minister's Department directed in writing dated 12 January 2009 to the ACLR and the Director to reconsider their decisions in rejecting the appellants' land application.

[14] Subsequently, on 23 March 2011, the Land Utilisation Committee of E the Kunak District ('LUC') indorsed the appellants' land applications and recommended for approval to the Director (exh 'A2' at p 112 of encl 2).

[15] On 27 August 2012, the Secretary of Natural Resources approved the F appellants' land applications for the said lots and directed the director to carry out the survey of the 14 lots of the said lands in Native Title (exh 'A2' at pp 113–117A of encl 2).

[16] While the appellants' land applications and land enquiry were still G pending for consideration, the director on 18 September 2008 issued 'an Offer to Alienate Land' to the first respondent for 200 hectares of land pursuant to the first respondent's land application PT 99241806 (exh 'A2' at pp 118–122 of encl 2).

H **[17]** On 14 June 2013, the appellants wrote to the relevant authorities including the District Surveyor, ACLR and Director objecting to the survey of the said land applied by the first respondent for reasons that the same overlaps with the lots occupied and cultivated by the appellants with existing NCR (exh 'A2' at pp 127–128 of encl 2).

I **[18]** It was the appellants' submission that the director was wrong to issue the said offer to alienate land to the first respondent on 18 September 2008 since the director knew and ought to know of the appellants' rights and interests in respect of the same land.

THE FIRST LAND ENQUIRY

[19] The first land enquiry proceedings to deal with the appellants' claims of NCR and their objection to the first respondent's land application was held on 15 August 2013 and in that land enquiry the ACLR dismissed the appellants' claims and objection.

[20] On appeal to the Director against the ACLR's decision, it was again dismissed on 9 December 2014 by the Director in Director Land Enquiry (Appeal) No 45 of 2013.

[21] The appellants appealed to the High Court in Originating Summons No TWU-24–1/1 of 2015 against the decision of the Director under s 41(1) of the Land Ordinance.

[22] On 11 June 2015, the High Court granted the appellants' Originating Summons No TWU-24–1/1 of 2015 in respect of the same lands for the following orders (exh A2 at pp 14–16 of encl 2):

IT IS HEREBY ORDERED that:

(1) An Order that the decision of the 2nd Defendant as the Director of Lands & Surveys, Sabah dated the 9th of December 2014 in Director Land Enquiry (Appeal) No.45 of 2013 in dismissing the Plaintiffs' appeal against the decision of the 3rd Defendant as Assistant Collector of Land Revenues of Kunak dated the 20th of August 2013 in PPHT Land Enquiry No.DOK.240.1/678/Vol.1(66) is set aside;

(2) An Order that the decision of the 3rd Defendant as the Assistant Collector of Land Revenues of Kunak dated the 20th of August 2013 in PPHT Land Enquiry vide Reference No.DOK.240.1/678/Vol.1(66) is set aside;

(3) The 3rd Defendant as the Assistant Collector of Revenues, Kunak shall hold a fresh Land Enquiry pertaining to the Plaintiffs'/Appellants' objection and claims as per their letter dated the 14th of June 2013;

(4) The 3rd Defendant as the Assistant Collector of Land Revenues, Kunak shall hold a joint site inspection prior to the Land Enquiry before the Assistant Collector of Land Revenues, Kunak to determine the exact location of the land application of the Plaintiffs and Defendant with each party to bear their own costs;

(5) The 1st Defendant shall pay costs of RM5,000.00 to the Plaintiffs. Dated this 11th day of June, 2015

DECISION

ACLR fresh land enquiry

[23] In compliance with orders (3) and (4) of the High Court dated 11 June 2015 above, ACLR of Kunak held a fresh ACLR land enquiry proceedings on 9 November 2016 to deal on the appellants' objection of the first respondent's land application No PT 99241806 and the appellants' claims for lots 3, 4, 2 and 6.

[24] On 7 August 2017, the ACLR gave his decision of the land enquiry which are as follows:

(a) Lot 3 (L.E. 2/2015) – first appellant

'... saya dengan ini membuat keputusan untuk mengiktiraf *HANYA sebahagian sahaja kawasan yang diduduki iaitu kawasan yang tidak terlibat dengan kawasan yang telah diluluskan kepada Bumi Aseri Sdn Bhd (PT99244806) menurut seksyen 16 Ordinan Tanah Sabah'.*

(b) Lot 4 (L.E. 5/2015) – second appellant

'*... saya dengan ini menolak tuntutan kerana kawasan yang dituntut telahpun diluluskan kepada kepada Bumi Aseri Sdn Bhd (PT99244806)*'.

(c) Lot 2 (L.E. 14/2015) – third appellant

'*... saya dengan ini membuat keputusan untuk mengiktiraf HANYA sebahagian sahaja kawasan yang diduduki iaitu kawasan yang tidak terlibat dengan kawasan yang telah diluluskan kepada Bumi Aseri Sdn Bhd (PT99244806) menurut seksyen 16 Ordinan Tanah Sabah'.*

(d) Lot 6 (L.E. 4/2015) – second appellant

'*... saya dengan ini menolak tuntutan kerana kawasan yang dituntut telahpun diluluskan kepada kepada Bumi Aseri Sdn Bhd (PT99244806)'.*

(pp 1–24 of exh 'A10' of encl 2.)

Director Land Enquiry (Appeal) Nos 37, 39, 48 and 38 of 2017

[25] Dissatisfied with the ACLR's decision in rejecting parts of their claims, the appellants then appealed to the Director in Director Land Enquiry (Appeal) Nos 37, 39, 48 and 38 of 2017 pursuant to s 41(1) of the Land Ordinance.

[26] On 16 March 2018, upon hearing the appeal, the main part of the Director's decision is summarised as follows:

(a) the appellants have established NCR in lots 3, 4, 2 and 6 in accordance with s 15(c) of the Land Ordinance.

(b) however, the appellants' appeal is dismissed for the reason that lots 3, 4, 2 and 6 were the lands for the proposed forest reserve (cadangan hutan simpanan) and not a state land based on the definition of the term 'State land' under s 4 of the Land Ordinance.

[27] Hence, the present appeal by the appellant against the Director's decision given on 16 March 2018 pursuant to s 41(1) of the Sabah Land Ordinance by way of the Originating Summons No TWU-24-27/4 of 2018.

The present appeal

[28] The relevant course papers for the present appeal are as follows:

(a) the appellants' originating summons dated 12 April 2018 (encl 1);

(b) the appellants' affidavit in support affirmed by Abdul Salin bin Amming on 12 April 2018 (encl 2);

(c) the first respondent's affidavit in opposition affirmed by Hussin Chok @ Chok Sin Wui on 4 June 2018 (encl 7); and,

(d) the appellants' affidavit in reply of Abdul Salin bin Amming affirmed on 19 June 2018 (encl 12).

[29] It was the appellant's submission that the Director in his decision had ruled that the appellants have established NCR in Lots 3, 2, 4 and 6 according to s 15(c) of the Land Ordinance. The relevant part of the Director's decision is stated as follows:

> Berdasarkan laporan tersebut, saya berpendapat bahawa corak pendudukan perayu-perayu tersebut adalah mematuhi s 15 OTS kerana kelapa sawit boleh dikategorikan sebagai '... plants of economic value...' di bawah s 15(c) OTS'.
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> (p 22 of Exh 'A-10' of Encl 2)

[30] The appellants further submitted that the director, despite having found that the appellants have proved NCR in Lots 3, 4, 2 and 6 according to s 15(c) of the Land Ordinance, dismissed the appellants' appeal and set out his grounds of dismissal among others: the lots were included for the proposed forest reserve and hence the lots were no longer state lands according to his interpretation of the term 'State land' under s 4 of the Land Ordinance. The relevant part of the director's decision is reproduced as follows:

> Walau bagaimanapun, terdapat persoalan samada kelapa sawit tersebut ditanam di atas tanah kerajaan atau tidak.
>
> Persoalan ini merupakan persoalan undang-undang.
>
> Berdarsarkan rekod, perayu-perayu pernah memohon tanah tersebut. Walau bagaimanapun, PT perayu-perayu telah ditolak. Alasan penolakan adalah, kawasan

yang dipohon tidak tersedia kerana termasuk dalam kawasan cadangan tanah simpanan perhutanan. Oleh itu, kerajaan berniat untuk tidak memberi milik tanah tersebut kepada sesiapa.

Penolakan tersebut jelas memberikan satu notis kepada perayu-perayu behawa tanah tersebut bukan lagi tanah kerajaan.

Definsi tanah kerajaan jelas menyatakan behawa mana- mana tanah yang akan dismpan untuk kegunaan awam, bukan lagi tanah kerajaan seperti yang didefinisikan di bawah s 4 OTS.

(p 22 of exh 'A-10' of encl 2)

The state land — meaning

[31] It is against the interpretation of the meaning of the term 'State land' by the Director, the appellants submitted it was wrong where the Director had completely disregarded the important word of 'thereafter' which is repeated four times in the definition under s 4 of the Land Ordinance.

[32] To appreciate the appellants' submission on the correct definition of the term 'State land' and why they contended that the Director was wrong in the director's interpretation of the same, it is imperative to reproduce s 4 of the Land Ordinance and it is as follows:

4 In this Ordinance the following terms shall, if not inconsistent with the context or subject matter, have the respective meanings hereby assigned to them —

'State land' means all lands which have not been and may not hereafter be reserved for any public purpose, or which have not been and may not hereafter be leased or granted to or are not and may not hereafter be lawfully occupied by any person, and includes all land which, at the commencement of this Ordinance, may have become or which hereafter may become forfeited by reason of any breach of the conditions on which the same have been lawfully occupied, or which have been or may hereafter be surrendered to the Government by the lawful owner thereof;

[33] The appellants submitted that the word 'hereafter' means the interim period after the year 1930 (as the Land Ordinance was enacted in 1930) until the time the subject land is claimed and, in the present appeal, the claim made by the appellants for NCR.

[34] According to the appellants, the term 'State land' under s 4 means the land which has not been reserved for public purpose after the year 1930 until the time such land is being claimed.

[35] The director's interpretation of 'State land' to mean 'all lands which will be reserved for public purpose are no longer State land' without considering and giving effect to the word 'hereafter' used in s 4 is utterly wrong. Without a

timeline, all the lands may be reserved for public purpose which means that there is no longer any State land at any point in time.

[36] It was also the appellants' submission that the director's interpretation of state land would also mean that no natives in Sabah can ever establish NCR on the land when and after the Land Ordinance was enacted in 1930, which in turn would be inconsistent with the context or subject matter under consideration as appearing in the first sentence of s 4 of the Land Ordinance as follows:

> 4 In this Ordinance the following terms shall, if not inconsistent with the context or subject matter, have the respective meanings hereby assigned to them ...

[37] This important legal issue of whether NCR can be created by natives after the Land Ordinance in 1930 was considered and answered by the Court of Appeal in *Magudar bin Ambit v Rambilin bt Ambit & Ors* [2014] 5 MLJ 873 where David Wong JCA (as he then was) held that:

> [37] As for the existence of the words 'still held' in s 88, we are of the view that those words do not refer to 1930 but to the time of registration of the land by the director... Hence it can be safely inferred that s 88 *does not deal with the creation of native customary rights. That part of the Sabah Land Ordinance is found in Part 1* — ss 13, 14, 15 and 16 where they set out as to how native customary rights can be created under the regime of the Sabah Law Ordinance. As stated by us earlier, s 88 must be interpreted in the context of the whole Ordinance and not by itself. We also wish to state that if the Legislature had wanted to make its intention clear, it can be easily done by simply employing the same wordings as that in the Sarawak Land Code. As there are no such clear words, we cannot accede to the contention of the appellant.
>
> [38] Hence, we find no merit in the submission of learned counsel for the appellant that native customary rights cannot be created after 1930.

The first respondent's submission on the term 'State land' under s 4 of the Land Ordinance

[38] According to the first respondent, any land which has been reserved for any public purpose is not a state land, and hence could not be alienated to anyone else including the appellants (*Ara bte Aman & Ors v Superintendent of Lands and Mines, Second Division* [1975] 1 MLJ 208).

[39] To make their point clear that the appellants could not claim the said Lots as their NCR land because such lands are being forest reserved, the first respondent cited the case of *Rustimah bt Buyong & Anor v Lembaga Industri Getah* [2013] 10 MLJ 535, where it was held that:

> ... Being a forest reserved land, it could not be conceivable for anyone to be able to clear and/or cultivate on such land nor in occupation thereon ... Therefore, the

A reasonable inference that can be drawn is that the plaintiffs must have been well aware of such risks to enter into possession of the disputed land and if indeed they had entered into, as stated expressly by PW3, that cannot be construed to be that they have the right of possession thereof.

B **[40]** In support of the director's decision that the appellants' lots 3, 4, 2 and 6 are forest reserved land, the first respondent submitted that it can be shown from the offer to alienate land by the director to the first respondent in the first respondent's land application No PT 99241806 wherein the special terms and conditions of the offer stated, inter alia, that:

C 1.1 The said land is demised herein exclusively for the purpose of tree plantation for commercial timber plantation.

1.5 The development of the said Land for the aforesaid purpose shall be subject to the direction and control of the Director of Forestry.

D **[41]** In reply to the appellants' contention that if the said lots 3, 4, 2 and 6 were forest reserve lands, the first respondent's subsequent land application in PT 99241806 would not have been approved by the director on 18 September 2008, the first respondent submitted that the power to alienate State Land is E vested exclusively in the director and he may impose special conditions in respect of the alienation of land pursuant to s 9 of the Land Ordinance.

Director's decision that lots 3, 4, 2 and 6 are forest reserve

F **[42]** To reiterate, the director in his decision dated 16 March 2018 stated that the lands applied by the appellants in lots 3, 4, 2 and 6 were identified for the proposed forest reserve land which findings was wrong, according to the appellants.

G **[43]** Forest reserve is defined under s 2 of the Forest Enactment 1968 to mean 'a Forest Reserve declared as such under section 12 of this Enactment'. Section 12 of the Forest Enactment 1968 provides that:

H 12(1) After consideration of the documents received under section 10 of this Enactment, the Yang di-Pertua Negara may, by notice in the Gazette, declare the whole or any part of the land specified in a notice of intention to be a Forest Reserve.

[44] From the above definition of forest reserve under the Forest Enactment I 1968, it was the appellants' submission that in order to be a forest reserve, there must be a declaration by TYT by *gazette* and in the present case, there was nothing shown on the existence of such *gazette* of forest reserve during the land enquiry proceedings before ACLR or the appeal before the director.

[45] As such, the appellants submitted that the director's decision in dismissing the appeal on the ground that the appellants' lots were within the purported proposed forest reserve land was baseless and without any merit.

The court's findings on whether the director's interpretation of state land under s 4 of the Land Ordinance and whether the director's finding that Lots 3, 4, 2 and 6 were within the area under the proposed forest reserve land were wrong in law and fact

[46] The above two issues namely the decision of the director on the interpretation of state land and forest reserve are jointly considered because they were intertwined.

[47] Based on the first respondent's own submission that a land is not a state land if it had been reserved for any public purpose including for the purpose of forest reserve and in support, they cited the case of *Ara bte Aman.* That being the case, it was the first respondent's submission that the appellants could not have cleared, cultivated and occupied on lots 3, 4, 2 and 6 and if they chose to do the same, the reasonable inference would be that they must have been well aware of the risk of not having the right of possession thereof (*Rustimah bt Buyong & Anor v Lembaga Industri Getah* [2013] 10 MLJ 535).

[48] The first respondent's view is consistent with the director's decision when he interpreted the definition of 'State land' to mean 'all lands which are to be reserved for public purpose are no longer State land'. In the director's own words, he stated 'Definsi tanah kerajaan jelas menyatakan behawa mana-mana tanah yang akan dismpan untuk kegunaan awam, bukan lagi tanah kerajaan seperti yang didefinisikan di bawah s 4 OTS'.

[49] Reading through the parties' submission, I find that there was nothing to show that that the lands in Lots 3, 4, 2 and 6 applied by the appellants had been reserved for any public purpose let alone for forest reserve after 1930 until the time when their applications were being considered in 2002.

[50] In arriving at his decision that the appellants' lots were within the proposed forest reserve land, the director had nothing before him, for instance, the *gazette* notification to show as such. Similarly, such *gazette* notification was never in existence during the land enquiry before the ACLR.

[51] By saying lots 3, 4, 2 and 6 were within the proposed forest reserve land, the director was merely relying on the finding and decision of ACLR in the land enquiry through the formal letters from ACLR dated 31 October 2002 and 25 January 2008 rejecting the appellants' lands' application.

[52] In the above ACLR's letters, ACLR gave his reasons in rejecting the appellants' lands' applications which are as follows:

> (a) 2.1 Keseluruhan kawasan yang dipohon telahpun dicadangkan sebagai Simpanan Kerajaan
> (letter dated 31 October 2002 at p 95 of exh A2 of encl 2);
>
> (b) ... tetapi ianya tidak dapat disokong kerana kawasan telah diperuntukkan sebagai tanah Simpanan Kerajaan dalam Mesyuarat Jawatankuasa Pengunaan Tanah Daerah Kunak 1/2002 yang telah diadakan pada 16.5.2002

(letter dated 25 January 2008 at p 111 of exh A2 of encl 2).

[53] As there is no proof to show that the appellants' Lots were within the area for forest reserve, the decision of the Director could not be supported and therefore is utterly wrong. In my view, lots 3, 4, 2 and 6 are still state land until they were declared to be so as forest reserve by way of a *gazette* notification pursuant to s 12(1) of the Forest Enactment 1968. At best, the said lands were merely proposed for forest reserve during the LUC meeting held on 16 May 2002 as mentioned in the ACLR's letter dated 25 January 2008 (p 111 of exh A2 of encl 2).

[54] Further, it is also my view that the director had erred in his decision when he said that the appellants have proved NCR in lots 3, 4, 2 and 6 according to s 15(c) of the Land Ordinance but at the same time ruled that the said lots were located within the forest reserve area with no supporting evidence. He then made an erroneous finding that the lands are no longer state land.

[55] With this ground alone, the decision of the director dated 16 March 2018 could not stand on a strong footing, therefore, it is liable to be set aside.

[56] Learned counsel from the state attorney general's chambers for the second and third defendants did not submit in the present appeal and they had given their undertaking to abide by this court's decision in any event.

[57] Apart for the above two issues, in opposing the appellants' appeal, Ms Kelly, learned counsel for the first respondent also raised few other issues amongst others: that the director's decision is non- appealable; that the appellants had not established their NCR claims; that the location and boundary of the appellants' lots had not been ascertained; and, that the appellants had no legitimate expectation over their NCR claims on the said lots.

[58] For completeness, I will discuss on these other issues raised by the first respondent in brief. A

Whether the decision of the director is appealable

[59] The first respondent submitted that the alienation of land in PT 99241806 by the director to the first respondent is made under s 9 of the Land Ordinance and thus not appealable. B

[60] I disagree with learned counsel for the first respondent because the present appeal is not to challenge the Director's discretion to alienate state land made under s 9 of the Land Ordinance but the appeal is in respect of the decision of the director in dismissing the appellants' appeal before him on the ground that the appellants' lots were situated within the area proposed for forest reserve. The appellants also disagree with the director on his interpretation concerning the definition of 'State land' under s 4 of the Land Ordinance. C D

[61] The appeal before the director was also in relation to the decision of ACLR which only recognised parts of the appellants' NCR claims but the rests were not allowed simply because such claims were within the land applied by the first respondent in PT 99241806. E

Whether the appellants have established their NCR claims

F

[62] I have no issue with the submission of learned counsel for the first respondent that any person claiming to be a native may seek from the Native Court for a declaration on his or her native status pursuant to s 3(1) of the Interpretation (Definition of Native) Ordinance (Cap 64) (see *Norsitah binti Ottoh v Nasry bin Yahya & Ors* [2010] MLJU 2207). G

[63] However, I have some reservation in regards to learned counsel's submission before this court that the appellants had failed to establish their NCR on the Lots. Whether or not the appellants can establish their NCR claims, it is a matter within the purview of the Director or the ACLR based on the land enquiry conducted by them pursuant to ss 12–16 of the Land Ordinance. H

[64] In this regard, the ACLR has already made his findings that the appellants' claims for NCR have been established only to the areas which were not overlapping with the part of the lands alienated to the first Respondent. On appeal to the Director, he further of the view that the appellants have established NCR claims based on s 15(c) of the Land Ordinance upon examining the evidence presented before him. I

[65] In the case of *Darinsok Pangiran Apan & Ors v Hap Seng Consolidated Bhd & Ors* [2011] 6 CLJ 733, the Court of Appeal in deciding the jurisdiction of the High Court on the issue of NCR held, inter alia, as follows:

> It is abundantly clear to us that the High Court does not have any original jurisdiction to hear the plaintiffs' NCR claim. Specifically, under s 14, the plaintiffs' NCR claim has to be decided in the first instance by the ACLR. Thereafter, if the plaintiffs are dissatisfied with the ACLR's decision, the plaintiffs may invoke the first limb of s 41(1) to appeal to the Director. The plaintiffs may thereafter bring their appeal (relating to their NCR claim) to the High Court under the second limb of s 41(1) ...

[66] Based on the above authority, it is my view that the issue of NCR claim is exclusively for the ACLR or the collector to determine under the Land Ordinance and the High Court being the appellate court would only have the jurisdiction to revise such an issue whenever there is an appeal.

[67] Before this court, the first respondent did not file an appeal against the findings of fact by the director that the NCR claims was established based on s 15(c) of the Land Ordinance. The appeal was however filed by the appellants against the sirector not on his findings of fact on the establishment of NCR but on his further findings that the subject area upon which the said NCR was established is not a state land as it was reserved for the forest reserve.

[68] As there was no appeal on the issue of NCR which has been determined by the ACLR and the sirector, it is not therefore within this court jurisdiction to interfere or intervene with such findings and determination. It follows that the complaint of learned counsel for the first respondent that the appellants could not claim for NCR as they were not born in the district of which the lots are situated or that the appellants had failed to produce any documents such as audited accounts, financial statements, etc to prove that they have developed the Lots could not be entertained at this stage.

The location and the boundary of the NCR lots were not ascertained

[69] Learned counsel for the first respondent argued that the appellants' NCR claims on lots 3, 4, 2 and 6 must fail as the ACLR had not announced nor published the location coordinates of the said lots. On the contrary, the first respondent has a valid claim as the 'Registered Survey Paper' (RSP) No 20-13249001 had been issued by the Lands and Surveys Department, Kunak on 10 April 2013 in respect of the land alienated to the first respondent in PT 99241806.

[70] On this issue of the uncertainty of the location and the boundary of the appellants' NCR claims on lots 3, 4, 2 and 6, it is my view that it should be

determined by the relevant authority in the light of the latest findings of the ACLR and the director both in 2017 and 2018 respectively.

Legitimate expectation

[71] Learned counsel for the first respondent also submitted that the appellants' land application in PT 20-03240179 to 0191 and PT 20-03240193 did not confer any legitimate expectation nor any proprietary rights upon the appellants. To a certain extent, I agree with this submission but the claim for legitimate expectation may be valid in view of the recent findings by the ACLR that the appellants NCR claims is overlapping with the area alienated to the first respondent, hence it was dismissed. This is also compounded by the recent findings of the director that despite the appellants succeeded in establishing the NCR claims, such claim ought to be dismissed as the subject area is proposed for forest reserve and as such it is no longer a state land.

CONCLUSION

[72] Based on the above reasons, the originating summons (encl 1) is granted in terms. The appeal is allowed.

Appeal allowed.

Reported by Mohd Kamarul Anwar